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No. 84-1842

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK TORRES,

Petitioner,

—vs.—

LITTLE FLOWER'S CHILDREN'S SERVICES, RALPH CHILLION, THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, CAROL PARRY, ANN CAHALAN, SUSAN MCCAULEY and JOHN AMBERG,

Respondents.

BRIEF FOR RESPONDENTS, LITTLE FLOWER CHILDREN'S SERVICES AND RALPH CHILLION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether petitioner's due process rights under the United States Constitution were violated by the New York State Court of Appeals' refusal to recognize a cause of action sounding in educational malpractice?

2. Whether petitioner has exhausted his State created remedies thus making this lawsuit justiciable and subject to the jurisdiction of this Court?

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OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 64 N.Y.2d 119, 485 N.Y.S.2d 15 (1984) and is set forth in Petitioner's Appendix at pages A2-A33. The New York State Appellate Division, First Department, affirmed the New York State Supreme Court, Special Term, without opinion, 94 A.D.2d 987, 463 N.Y.S.2d 349 (App. Div. 1st Dept. 1983). The opinion of the New York State Supreme Court, Special Term, is found in Petitioner's Appendix at pages A34-A39.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

This case allegedly involves the Fourteenth Amendment, Section 1, to the United States Constitution.

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

This case allegedly involves the statutes and regulations found in Petitioner's Appendix at pages A40-A58.

STATEMENT OF THE CASE

In 1964 Little Flower Children's Services assumed a contractual obligation to provide petitioner basic care, including the arrangement of education and vocational training.[1] Little Flower's contract was with the New York City Department of Social Services (DSS) who had assumed responsibility for petitioner's care since he had been abandoned by his mother.[2]

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1 PA17, PA45 (All references to Petitioner's Appendix to the New York State Court of Appeals are referred to as PA).

2 PA 17, 45, 148-150.

Respondent Little Flower enrolled petitioner in a public school (P.S. 181M) maintained by the New York City Board of Education on Little Flower's premises. (PA 45, 59) Petitioner's native language is Spanish, but he could understand English by the third grade.

During the time of his attendance at P.S. 181M petitioner could not read English. This inability to read was regularly discussed at conferences attended by petitioner's teachers, the school's principal and members of the psychiatric, psychological and clinical staff employed at Little Flower.[3]

In March, 1972 petitioner was taken by a Little Flower social worker to a reading specialist. This specialist concluded that plaintiff had an extremely complex reading problem and that any remedial process would be long and tedious and that progress would be made only in small steps.[4]

After petitioner's visit to this specialist, Little Flower arranged tutoring in reading for him.[5] In June, 1972 petitioner was graduated from the eighth grade and further tutoring was arranged. Petitioner stopped attending this tutoring since no transportation was provided and the walk took approximately 45 minutes each way.[6]

In October, 1972, petitioner was enrolled in a BOCES school and placed in a class for the educable retarded, but he was expelled in March, 1973 due to various difficulties.[7]

The claims asserted in this action are predicated on three theories: (1) that respondents breached their legal duty to educate petitioner; (2) that respondents breached their obligations to petitioner as a third-party beneficiary of the purchase

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3 PA 162.

4 PA 158.

5 PA 167-168.

6 PA 168.

7 PA 144.

of service contract between Little Flower and DSS,[8] and (3) that in failing to provide him with an appropriate education as guaranteed by the Constitution and laws of the State of New York, without either a hearing or other administrative proceeding, respondents violated petitioner's rights under the Due Process Clause of the 14th Amendment to the United States Constitution and 42 U.S.C., section 1983.[9]

Respondents moved for summary judgment and said motions were granted at Special Term, New York State Supreme Court, Justice Francis Pecora, Jr., presiding.[10] The decision at Special Term was based on a 1979 New York Court of Appeals decision which barred lawsuits in New York sounding in educational malpractice. *Hoffman v. Board of Education of the City of New York*, 49 N.Y.2d 121, 424 N.Y.S.2d 376 (1979).

The Appellate Division, First Department, affirmed the judgment of the Supreme Court, without opinion, on May 10, 1983 (94 A.D.2d 987, 463 N.Y.S.2d 349 (App. Div. 1st Dept. 1983)). The Court of Appeals granted petitioner's motion for leave to appeal pursuant to C.P.L.R. 5602(a) on February 21, 1984.

On December 27, 1984, the New York State Court of Appeals affirmed the decision of the Appellate Division dismissing petitioner's complaint. The opinion is reported at 64 N.Y.2d 119, 485 N.Y.S.2d 15.[11]

Petitioner moved for a rehearing and this motion was denied on February 21, 1985.[12]

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8 PA 21, 30.

9 PA 21, 30-31.

10 PA 34-39.

11 PA 2-33.

12 PA 1.

ARGUMENT

I. Petitioner has failed to demonstrate a withholding of any state entitlement which gives rise to a deprivation of his Constitutional Rights under the Due Process Clause of the Fourteenth Amendment.

Petitioner, in order to have a writ of certiorari issued to review the decision of the New York State Court of Appeals in this case, must show that he had a state-created entitlement to an appropriate education. However, the New York Court of Appeals has determined that no such entitlement exists and therefore there cannot be, and has not been, a deprivation of a state-created entitlement.

The entitlement to which petitioner lays claim could not be determined through the application of any objective criteria. The subjective decisions of education officials would have to be reviewed with regard to each student.

The New York Court of Appeals, while recognizing that in such cases, a wrong may have been committed, does not recognize such action as giving rise to a cognizible tort. *Donohue v. Copiague Union Free School Dist.*, 47 N.Y.2d 440 at 445.

In the cases of *Donohue* and *Hoffman v. Board of Education of the City of New York*, 49 N.Y.2d 376 (1979) the New York Court of Appeals refused to recognize causes of action based upon educational malpractice. These refusals were based on a strong public policy against the practice of having the Courts of New York substitute their judgment, or the judgment of a jury, for the professional judgment of educators and governmental officials actually engaged in the complex and often delicate process of educating the many thousands of students in New York schools. *Donohue*, 49 N.Y.2d at 125-126.

The Court of Appeals in the instant case determined that it is not the identity of the defendants which is at the root of the

policy enunciated in *Hoffman* and *Donohue*, but the nature of the determinations courts would be called upon to make.[13]

To recognize such a cause of action the courts in the instant case would be required to assess the nature of petitioner's "difficulty in learning, including such elusive factors as his own attitude, motivation, temperament, past experience and home environment . . . to examine Board of Education policies and their implementation by school officials—the very role we have already declined to assume—and then in addition to determine whether the guardians' responses to these policies and decisions constituted negligence.[14] The Court refused to go, as urged by petitioner, a step beyond where it would not go in *Donohue* and *Hoffman*.

Since there is no state-created entitlement to a specific education no due process protection need be applied when, with the wisdom gained with 20/20 hindsight, it is learned that the program of education chosen for a particular individual, was not the best one. While a violation of due process may apply if a child is not placed in school at all, no such claim is made here. *Patton v. Dumpson*, 425 F.Supp. 621 (S.D.N.Y. 1977).

II. Petitioner has failed to exhaust his state remedies, therefore this case is not ripe for consideration by this Court.

If a person feels aggrieved by the nature of the education he is receiving or has received, he may appeal or petition to the commissioner of education.[15]

Petitioner commenced the instant action in 1977, when he was approximately 20 years of age. From the time of his discharge from Little Flower even until the present there is no

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13 PA 12.

14 PA 12-13.

15 Education Law § 310 (A40).

indication that petitioner undertook this course of action. It is the course of action most likely to remedy the wrong petitioner claims, an inability to read.

CONCLUSION

For each of the reasons set forth herein it is respectfully submitted that a writ of certiorari should be denied.

Dated: July 19, 1985

Respectfully submitted,

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